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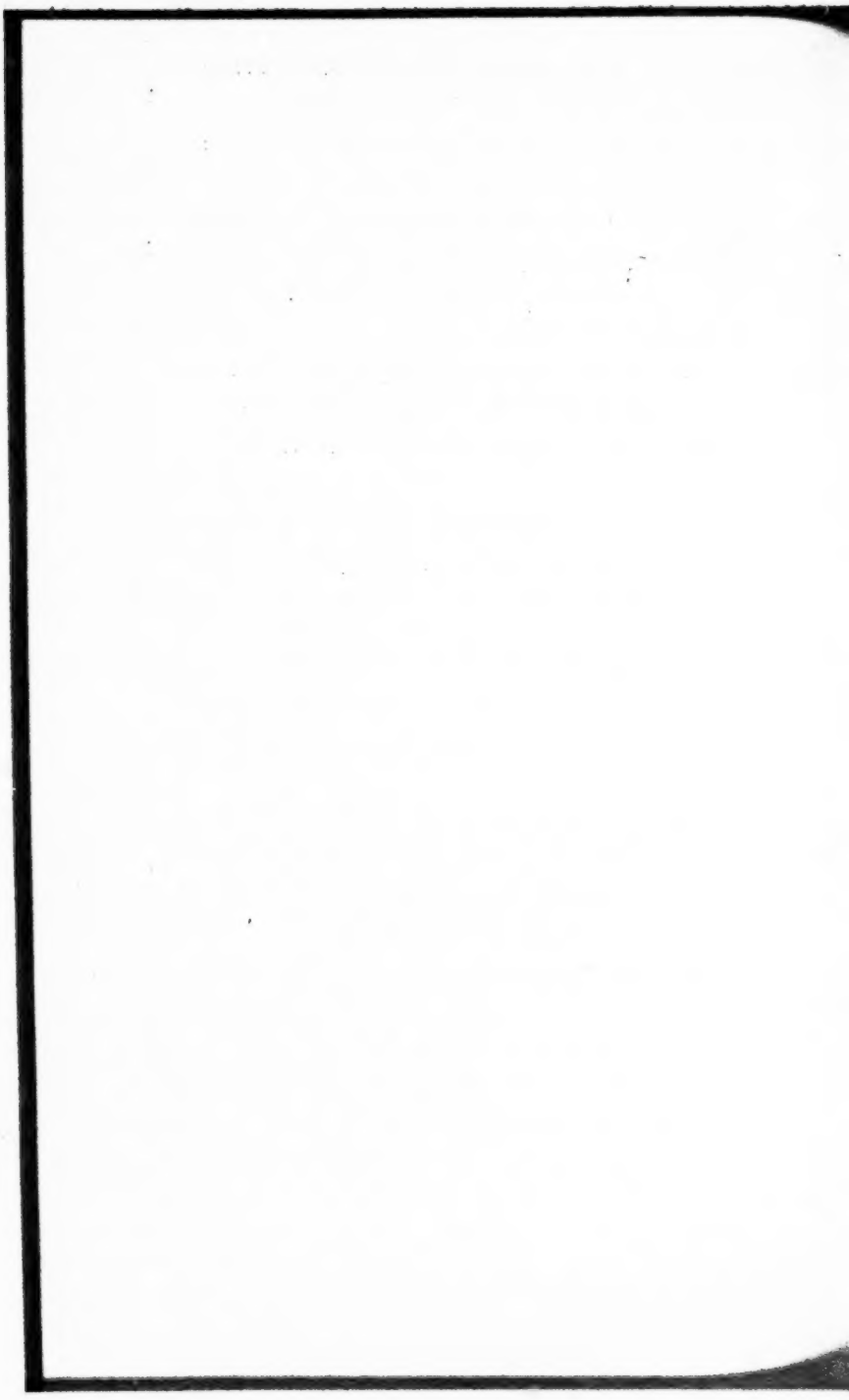
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In The

Supreme Court of the United States

OCTOBER TERM, 1969.

No. _____.

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,

Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on January 22, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at ____ F.2d ____ and set forth in Appendix A hereto. The opinion of the District Court is reported at 294 F. Supp. 727 and set forth in Appendix B.

JURISDICTION.

The judgment of the Court of Appeals, set forth in Appendix C, was entered on January 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254 (1), at 49 (1948).

QUESTION PRESENTED.

Upon entering into a new general bargaining agreement in 1953, the locomotive engineers and firemen on the Shore Line and the carrier omitted the existing work rule which required the use of firemen on diesel engines. Thereafter, the carrier did employ firemen at its southern terminal which straddled the Ohio-Michigan border, but abolished their use on road trains in 1968 when the yard was rebuilt and they were no longer required by the Ohio full crew law. The union then brought this action for an injunction, alleging that a work rule required the use of firemen and claiming that the rule had been changed unilaterally. The carrier denied that the rule remained in effect and contended that it had been superseded and abandoned as of the effective date of the new general bargaining agreement. The question presented is:

Did the District Court erroneously assume jurisdiction of a contract dispute over the interpretation or application of a collective bargaining agreement, the union having claimed that the firemen's work rule was carried forward from prior agreements into the new general bargaining agreement and was therefore in current effect as alleged?

The carrier contends that the National Railroad Adjustment Board has primary, exclusive jurisdiction, because a resolution of the contract dispute between the parties necessarily involves the interpretation and application of the collective bargaining agreements received in evidence.

STATUTES INVOLVED.

The statute principally involved is § 3 First (i) of the Railway Labor Act, as amended, 45 U.S.C.A. § 153 First (i), at 529 (1934).

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

STATEMENT OF THE CASE.

The Brotherhood of Locomotive Firemen and Enginemen filed this action under the Railway Labor Act for an injunction requiring the Shore Line to use firemen on its road trains entering and departing Lang Yard, its southern terminal which straddles the Ohio-Michigan border. As a basis for the relief sought, the union alleged in its Complaint that "Under the applicable collective bargaining agreements between plaintiff and defendant, defendant is required to assign a fireman to 'all engines' * * *." This allegation was specifically denied in the Answer. At the preliminary hearing, the Shore Line moved to dismiss the Complaint for lack of jurisdiction of the subject matter, because the District Court did not have jurisdiction of the contract dispute put in issue by the pleadings and demonstrated by the collective bargaining agreements received in evidence. Following the hearing and the filing of briefs by counsel, the District Court resolved the contract dis-

pute on the merits in favor of the union, overruled the motion to dismiss and entered an injunction as prayed for in the Complaint. The Court of Appeals affirmed; the Shore Line now seeks review by this Court. A brief history of the dispute follows.

1. In 1943, following mediation on a national level, the union and the Eastern Carriers Conference Committee, which then represented a large number of eastern carriers including the Shore Line, entered into a national diesel agreement which provided for the continued status of firemen.

2. In 1945, the locomotive engineers and firemen on the Shore Line, represented by their General Chairman, and the carrier entered into a new local schedule agreement or general bargaining agreement, which provided that the 1943 national diesel agreement would govern in the employment of firemen.

3. In 1953, the employees and the carrier entered into a new general bargaining agreement which superseded their 1945 agreement. Effective the same date they also entered into a side agreement which listed four prior local agreements and one national agreement remaining in effect thereafter. Although embodied in prior agreements, the specific work rule requiring the use of firemen was omitted from the 1953 agreements. By reason of this omission, the Shore Line contended at trial that the firemen's work rule was superseded and abandoned on the Shore Line by mutual consent as of the effective date of the 1953 agreements. The District Court held otherwise and found that the firemen's work rule was carried forward.[1]

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[1] In reaching this conclusion, the District Court in its opinion, reviewed the several collective bargaining agreements received

(Continued on following page)

4. In 1964, the Shore Line abolished all regular firemen assignments on road trains pursuant to the procedures established by Arbitration Award 282, but at the same time established a shuttle firemen service at Lang Yard in order to comply with the Ohio full crew law.[2]

5. In 1968, the Shore Line discontinued this shuttle firemen service upon completion of a new automatic hump yard at Lang which changed the layout of the yard, there no longer being a "main track" in Ohio within the meaning of the Ohio full crew law. The employees on the property promptly initiated time claims under the grievance procedure contained in their contract, protesting the removal of the shuttle firemen, and the union on their behalf immediately instituted this action for an injunction, claiming as a basis for jurisdiction that the Shore Line had unilaterally changed the agreement.

6. A clearly defined contract dispute existed in the case at bar over whether the firemen's work rule on the Shore Line was carried forward in 1953 from prior local and national agreements, or whether the rule was super-

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(Continued from preceding page)

in evidence in order to ascertain their meaning under the circumstances and, in so doing, characterized the 1953 side agreement in question as a document without significance that "* * * does not purport to be anything more than a list, * * *" (Appendix B hereto, page 16). The Court did not, however, find the side agreement invalid as a matter of law. Thus, the District Court interpreted and applied the agreements in favor of the union on the merits. The Court of Appeals agreed with the interpretation, saying that "We have read the contract provision relied upon by Appellant and find ourselves in general accord with the District Judge's interpretation set forth above * * *" (Appendix A hereto, page 13).

[2] Michigan did not have a full crew law. Shore Line road trains were stopped near the state line as they entered or departed Lang Yard and shuttle firemen called from the engineers' extra board were put on or taken off engines in order to ride approximately two miles through that part of the yard in Ohio to the vicinity of the yard office.

seded and abandoned as the Shore Line contended. This issue involved accrued rights under existing agreements or a minor dispute, as defined by this Court,[3] within the exclusive jurisdiction of an adjustment board under the Railway Labor Act. It therefore clearly appears that the District Court erroneously assumed jurisdiction of the contract dispute between the parties when it construed the collective bargaining agreements as carrying forward the firemen's work rule as a basis for the injunction.[4]

REASONS FOR GRANTING THE WRIT.

1. The decisions below are flatly contrary to applicable decisions of this Court. In ruling upon the merits, the Court of Appeals and the District Court ignored this Court's holding in *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946), which involved a jurisdictional dispute over which employees should be assigned to certain positions. In *Pitney*, the conductors' union and the trainmen's union each claimed the right to the work in question under their respective contracts. Reversing a district court judgment in favor of the conductors, this Court held that the Adjustment Board had exclusive jurisdiction of the contract dispute. The Court found that the district

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[3] *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 723 (1945).

[4] The District Court in its opinion called the contract dispute in question a major one, saying that the "* * * issue is not whether there is a conflict of interpretation of the terms of an agreement, but whether or not there *is* an agreement between the parties * * *" (Appendix B hereto, page 18). But this attempted distinction is without precedent and meaningless because one must interpret the 1953 agreements in order to determine whether there *is* a surviving work rule. Perhaps the District Court had in mind the distinction between the *validity* of an agreement and the interpretation thereof as highlighted in *Thompson v. New York Central Railroad Company*, 361 F.2d 137, 141 (2d Cir. 1966).

court necessarily had to interpret the contracts before it could find that the Act had been violated (326 U.S. at page 565). The same reasoning applies in the case at bar. Thus, the District Court necessarily had to interpret the 1953 agreements before it could find that the firemen's work rule survived as a basis for the injunction.[5]

2. The decisions below conflict with all of the applicable reported decisions of the federal courts of appeals.[6]

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[5] *Pitney* was followed four years later in *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950), where a state court had interpreted collective bargaining agreements. *Pitney* and *Slocum* were approved and followed in *Transportation-Communication Employees Union v. Union Pacific R. Co.*, 385 U.S. 157, 164 (1966), where the court held that the Adjustment Board must exercise its exclusive jurisdiction and interpret the collective bargaining agreements in a single proceeding with both disputant unions present. The rule of the *Pitney* case and the labor relations policy therein expressed have been followed and expanded by this Court in a number of subsequent cases in addition to those cited above including *Order of Railway Conductors v. Southern Ry. Co.*, 339 U.S. 255 (1950), where the Court observed that if a party could choose a court instead of the Board, the other party would be deprived of the privilege conferred by the statute; *Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co.*, 353 U.S. 30 (1957), upholding an injunction against a union restraining a strike over a minor dispute; *Pennsylvania R. Co. v. Day*, 360 U.S. 548 (1959), protecting the exclusive jurisdiction of the Adjustment Board in the case of a retired employee; *Union Pacific R. Co. v. Price*, 360 U.S. 601 (1959), holding that an employee submission to the Board precludes a common law action for damages; *Brotherhood of Locomotive Engineers v. L & N Ry. Co.*, 373 U.S. 33 (1963), holding that the union could not strike to enforce its interpretation of a money award; and *Gunther v. San Diego & Arizona E. R. Co.*, 382 U.S. 257 (1965), holding an award not reviewable by the courts on the merits merely because a part of the Board's award was a money award, the size of which the District Court had power to determine.

[6] See, e.g., *Thompson v. New York Central Railroad Co.*, 361 F.2d 137 (2d Cir. 1966), involving the question of whether a rule in a prior national agreement was carried forward in a local agreement (the same contract issue as in the case at bar); *Baltimore & Ohio R. Co. v. United Railroad Workers, etc.*, 271 F.2d 87 (2d Cir. 1959), involving the removal of firemen from diesel

(Continued on following page)

3. The courts below have disrupted the statutory procedure for the disposition of employee grievances and contract disputes. The published opinions of the Court of Appeals and the District Court invite employees and unions to use the federal courts in the Sixth Circuit for the disposition of contract disputes and the enforcement of collective bargaining agreements. Under the authority of the case at bar, it will be sufficient for a party merely to claim that the defendant has unilaterally changed the agreement in violation of the Act in order to show jurisdiction. This will defeat the statutory policy and will result in forum shopping. Thus, the federal courts may be used when the common law, as developed by the Adjustment Board, is contrary to the position of the complaining party. This point is illustrated by the disposition of the contract dispute in the case at bar, the District Court hav-

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powered tugs in New York Harbor; *Flight Engineers Inter. Ass'n. v. American Airlines, Inc.*, 303 F.2d 5 (2d Cir. 1962), involving the bargainability of certain union demands and whether they were within the scope of a supplemental agreement; *Norfolk and P.B.L.R. Co. v. Brotherhood of Railway Trainmen*, 248 F.2d 34 (4th Cir. 1957), involving the establishment of an additional point for reporting and relief; *Aaxico v. Air Lines Pilots Ass'n., etc.*, 331 F.2d 433 (5th Cir. 1964), involving the issue of whether the airline had unilaterally terminated the collective bargaining agreement; *St. Louis, S.F. & T. Ry. Co. v. Railroad Yardmasters of America*, 328 F.2d 749 (5th Cir. 1964), involving the abolishment of the positions of certain yardmasters; *Brotherhood of Locomotive Firemen & Enginemen v. Elgin, J. & E. Ry. Co.*, 404 F.2d 80 (7th Cir. 1968), involving a cause of action similar to the case at bar with regard to the removal of a fireman from a switching locomotive in an industrial plant; *Illinois Central R. Co. v. Brotherhood of Railroad Trainmen*, 398 F.2d 973 (7th Cir. 1968), involving the issue of whether a work rule existed requiring a certain number of trainmen on particular trains (essentially the same issue as in the case at bar); and *Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443 (9th Cir. 1968), involving the abolishment of yardmasters positions and the displacement of other employees represented by the switchmen.

ing refused to follow the pertinent rule of contract law laid down in prior awards.[7]

Moreover, the decisions below invite employees to use both an adjustment board and a federal court for the disposition of contract disputes. This prospect suggests serious questions as to whether awards of an adjustment board will have primary and binding authority.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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[7] In Award 3813, before the 3rd Division of the Board, involving the Brotherhood of Railway and Steamship Clerks, etc. v. Kentucky & Indiana Terminal Railroad Co., the dispute involved a 1941 supplemental rule and later general bargaining agreements of 1942 and 1945, neither of which expressly included the prior supplemental rule. The Referee held that when the supplemental rule was omitted from the subsequent general agreements it was superseded and abandoned as a matter of law.

APPENDIX A.

Opinion of the Court of Appeals.

No. 19556

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Plaintiff-Appellee,* v. THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY, *Defendant-Appellant.*	APPEAL from the United States District Court for the Northern District of Ohio, Western Division.

Decided January 22, 1970.

Before: EDWARDS, CELEBREZZE and COMBS, Circuit Judges.

PER CURIAM. In 1943 the parties to this proceeding signed an agreement known as the Eastern Diesel Agreement of 1943, under which Shore Line undertook to employ firemen on practically all diesel engine runs. The agreement had no termination date. Neither party has ever explicitly served notice of the revocation of this agreement, and up to the point of the instant litigation, firemen had in fact been employed on diesel engine runs, except to the degree they were eliminated by the national arbitration award, dated November 26, 1963, handed down by Arbitration Board #282 established in 1963 pursuant to Public Law 88-108, 88th Cong., 77 Stat. 132 (1963). Under the terms of this award, Shore Line firemen were eliminated on Shore Line diesel engines inside the state of Michigan, but were kept on such engines inside the state

of Ohio because of the Ohio "full crew" law. This state law requires the use of firemen on all freight runs on "main tracks" and switch engines in Ohio. OHIO REV. CODE ANN. §§ 4999.07 and 4999.08 (1954).

In 1967 and 1968 Shore Line made certain physical revisions of its Lang yard, the southern terminus of its line in Ohio straddling the Michigan state line. In so doing Shore Line created a hump yard for automatic classification of freight cars, added some switch tracks, and redefined the former "main" tracks in Ohio so that the previous "main" tracks now became "yard" tracks. Shore Line then served notice that it no longer was going to employ firemen on the previous "main" tracks within the state of Ohio.

The Brotherhood thereupon promptly filed this petition for injunctive relief alleging a violation of the 1943 Agreement and a failure on the part of Shore Line to follow the notice and mediation procedures established by federal law. 45 U.S.C. §§ 152, 156 (1964).

The United States District Judge for the Northern District of Ohio, Western Division, granted the relief sought by petitioner. His opinion stated in part:

> "Briefly stated, the contentions of the defendant are that when a new contract was negotiated between the parties in 1953, it completely superseded all former contracts, including the Eastern Diesel Agreement of 1943, which required the defendant to maintain firemen in diesels; that arbitration Award 282 enabled the defendant to abolish these positions, with limited exceptions, and it did do so, with respect to the runs in question, but the Ohio full crew law prevented this abolition from becoming effective; that the reconstruction of the switch yards made the Ohio full crew law no longer applicable to these runs, and defendant was thus at liberty to abolish them; and that the dispute involved here involves interpretation of

the terms of the contract between the parties, and hence is a 'minor dispute' over which this Court has no jurisdiction.

"Considering these matters in the order above presented, it is the Court's conclusion that the Eastern Diesel Agreement of 1943 was not superseded by the new general contract of 1953, but continues to be, and still is, in force between the parties. The fact that it was specifically included in the 1943 agreement, but not in the 1953 agreement, is of little probative value on this point, nor is the list of agreements remaining in effect after the 1953 agreement which is attached as a last page to D. ex. 14, particularly since this document does not purport to be anything more than a list, is undated, and the parties signing do not set forth their official positions.

"The Eastern Diesel Agreement is by its terms a self-perpetuating and continuing agreement. It deals with one of the most serious controversies in the whole realm of labor law, in which the unprecedented Congressional action was taken which led to Award 282. To suggest that such an agreement could be terminated by mere silence or failure to refer to it is totally illogical. Such an argument has as an inescapable tenet that the Washington Job Protection Agreement of 1936 was also terminated in 1953 by reason of non-mention in that later agreement.

"Of importance, too, on this issue is the fact that the defendant continuously sought, years after the execution of the 1953 agreement, to get rid of its obligations under the Eastern Diesel Agreement. If it were no longer in effect between the parties, why take action to eliminate it? That the parties continued to treat it as being in force after the 1953 agreement is shown, for example, by the episode of the hiring and discharge of fireman Abrams. (R. 181, 220-221) This Court finds that the 1943 Diesel Agreement, as well as the 1936 Washington Job Protection Agreement, were not terminated in 1953, but are instead current-

ly in full force and effect." *Bhd. of Locomotive Firemen and Enginemen v. Detroit & Toledo Shore Line R.R.*, 294 F. Supp. 727, 729-30 (N.D. Ohio 1968).

We have read the contract provisions relied upon by appellant and find ourselves in general accord with the District Judge's interpretation set forth above—particularly his holding that "mere silence" does not accomplish revocation.

We have no doubt that this controversy is a "major dispute," *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945), and that the District Judge had authority to enjoin respondent's unilateral self-help measures until the "status quo" provisions of the Railway Labor Act cited above had been exhausted. *See Detroit & Toledo Shore Line R.R. v. United Transportation Union*, ____ U.S. ____ (1969). 38 U.S.L.W. 4033 (Dec. 9, 1969).

Affirmed.

APPENDIX B.

Opinion of the United States District Court for the Northern District of Ohio, Western Division.

(Filed December 13, 1968.)

YOUNG, *J*:

For a number of years prior to February 8, 1968, the defendant, in compliance with the Ohio full crew laws, carried a fireman on its through trains to a point just north of the Ohio-Michigan border, as Michigan does not have a full crew law which required them to remain on the trains. The fireman would either wait at that point to board a southbound train, or return to the yard office.

Firemen were assigned to these runs, which were about two miles long, from the extra board.

Shortly before February 8, 1968, the defendant had completed a program of rebuilding its Lang yard into a modern, remote control "hump" yard, and in the process had added two more tracks running northward almost to the Ohio-Michigan border. It then renumbered all the tracks as switch tracks, and declared that the switch yard extended to the border, and the main tracks ran beyond that point.

On this basis, the Ohio full crew laws would not require the use of a fireman, since firemen are not required on local or through trains until they enter the main tracks, although they are required on switch engines.[1] The defendant then abolished the job assignments for firemen on the trains to and from the Ohio-Michigan border. The plaintiff thereupon commenced this action to enjoin the defendant from abolishing these job assignments without complying with Section 2, Seventh and Section 6 of the Railway Labor Act.[2]

The defendant asserts a number of justifications for its actions, or reasons that the Court lacks jurisdiction, all of which are countered by the plaintiff.

In the first place, it ought to be understood that basically the dispute here is one that is most irritating to lay people. Full crew laws are valid and constitutional,[3]

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[1] Ohio Revised Code §§ 4999.07, 4999.08.

[2] 45 U.S.C. § 152, Seventh, and 45 U.S.C. § 165. Section 152, Seventh, provides as follows:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 156 of this title."

[3] *Brotherhood v. Chicago, R. I. & P. Ry. Co.*, ___ U.S. ___ (1968); 37 L.W. 4032 (11-19-68).

and as such, they should be obeyed without question. However, to insist that they be so rigidly enforced that trains must be stopped and started, and men required to get on and off, and to wait around for long intervals between runs which are less than two miles long is absurd in reality, and closely approaches in law the point of application of the maxim *"De minimis non curat lex."* The Court recognizes, however, that the long history of difficulties between these parties makes impossible any other course than a strict adherence to the letter of the law. The conduct of the parties over the years has made it highly unlikely that either can unbend even slightly. Since a trial court must deal with things the way they are, rather than the way they should be, the problems presented in this case must be resolved strictly in accordance with law.

Briefly stated, the contentions of the defendant are that when a new contract was negotiated between the parties in 1953, it completely superseded all former contracts, including the Eastern Diesel Agreement of 1943, which required the defendant to maintain firemen in diesels; that arbitration Award 282 enabled the defendant to abolish these positions, with limited exceptions, and it did do so, with respect to the runs in question, but the Ohio full crew law prevented this abolition from becoming effective; that the reconstruction of the switch yards made the Ohio full crew law no longer applicable to these runs, and defendant was thus at liberty to abolish them; and that the dispute involved here involves interpretation of the terms of the contract between the parties, and hence is a "minor dispute" over which this Court has no jurisdiction.

Considering these matters in the order above presented, it is the Court's conclusion that the Eastern Diesel

Agreement of 1943 was not superseded by the new general contract of 1953, but continues to be, and still is, in force between the parties. The fact that it was specifically included in the 1943 agreement, but not in the 1953 agreement, is of little probative value on this point, nor is the list of agreements remaining in effect after the 1953 agreement which is attached as a last page to D. ex. 14, particularly since this document does not purport to be anything more than a list, is undated, and the parties signing do not set forth their official positions.

The Eastern Diesel Agreement is by its terms a self-perpetuating and continuing agreement. It deals with one of the most serious controversies in the whole realm of labor law, in which the unprecedented Congressional action was taken which led to Award 282. To suggest that such an agreement could be terminated by mere silence or failure to refer to it is totally illogical. Such an argument has as an inescapable tenet that the Washington Job Protection Agreement of 1936 was also terminated in 1953 by reason of non-mention in that later agreement.

Of importance, too, on this issue is the fact that the defendant continuously sought, years after the execution of the 1953 agreement, to get rid of its obligations under the Eastern Diesel Agreement. If it were no longer in effect between the parties, why take action to eliminate it? That the parties continued to treat it as being in force after the 1953 agreement is shown, for example, by the episode of the hiring and discharge of fireman Abrams. (R. 181, 220-221) This Court finds that the 1943 Diesel Agreement, as well as the 1936 Washington Job Protection Agreement, were not terminated in 1953, but are instead currently in full force and effect.

The contention that the defendant abolished these firemen's positions under Award 282, but the abolition was

not effective because of the Ohio full crew law, remaining suspended until the completion of the yard reconstruction in early 1968, must fail as a matter of law. The law is now clear that when the term for action under Award 282 ended in March, 1966, that was the end of any further changes. Unless the full crew laws were repealed or rendered ineffective within the award period, thus making those job blankings which had been suspended because of the full crew laws effective within the period, the suspended blanking would not become effective afterwards. *Brotherhood of Railroad Trainmen v. Akron & B. B. Ry. Co.*, 385 F.2d 581 (D.C. Cir. 1967), *cert. denied* 390 U.S. 923 (1968). Any changes in the existing agreements with respect to the composition of train crews must therefore be accomplished within the framework of 45 U.S.C. § 156, if these changes are sought after March 30, 1966, when Award 282 expired. 385 F.2d 581, 593.

On this point the case presents a considerable factual issue as to whether the reconstruction of the switch yard actually moved the beginning point of the defendant's main line north beyond the Ohio-Michigan border. It is not necessary to pass upon this factual dispute, since the legal basis for raising it does not exist, but the Court is inclined to think that a preponderance of the evidence demonstrated only that some additional side tracks were built along the old main tracks. The important reconstruction was south of the Ottawa River. The changing of nomenclature and numbering, and perhaps some slightly different usage of the tracks, hardly seems enough to rob the tracks of their characteristic of being the main tracks, but this factual issue is not decided.

The final contention here is that the fundamental dispute is merely one of interpretation of conflicting contract provisions, and this is a "minor dispute" over which

this Court has no jurisdiction.[4] In spite of the temptation for a busy court to adopt this contention, and thus get rid of a difficult case, a different conclusion must be reached.

The defendant, in advancing this argument, seems to take the position that the conflict in this area involves the interpretation of the provisions of the 1953 agreement and the Eastern Diesel Agreement. This argument, however, is totally inconsistent with defendant's claim that the Eastern Diesel Agreement is no longer effective between the parties, which is the real issue in this case.

The issue is not whether there is a conflict of interpretation of the terms of an agreement, but whether or not there *is* an agreement between the parties, and this issue causes the dispute to be characterized as "major."[5] Since the Eastern Diesel Agreement has been found to be in effect between the parties, under its terms the defendant clearly cannot unilaterally abolish the firemen's positions on these short runs to the Ohio-Michigan border. Therefore, the defendant must proceed in accordance with 45 U.S.C. § 156, or it violates 45 U.S.C. § 152, Seventh, and it may properly be restrained from failing or refusing to do so.[6]

Nor can the defendant's refusal to abide by the agreement be considered not to cause irreparable injury. The vital matter in such disputes as this is that they be handled within the framework of law, which is the only practical way to industrial peace. The destruction or disturbance of peace in this area unquestionably inflicts irreparable injuries upon all those involved in it.

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[4] 45 U.S.C. § 153, First (i).

[5] Cf. *Southern Railway Co. v. Brotherhood of Locomotive Firemen & Enginemen*, 384 F.2d 323 (D.C. Cir. 1967); *Elgin, J & E Ry. Co. v. Burley*, 325 U.S. 711 (1945).

[6] *Brotherhood of Railroad Trainmen v. Chicago R. & I. Ry. Co.*, 353 U.S. 30, 40-41 (1956); *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937).

For all of these reasons, an injunction will be issued as prayed for. Counsel for plaintiff may prepare and submit to opposing counsel a form of order expressive of this ruling. If counsel cannot agree as to the form of the order, counsel for both sides may submit forms of order, and the Court will thereafter fix and enter an order. This opinion will serve as the Court's findings of fact and conclusions of law.

DON J. YOUNG,
United States District Judge.

Toledo, Ohio.

APPENDIX C.

Judgment of the United States Court of Appeals For the Sixth Circuit.

(Filed January 22, 1970.)

APPEAL from the United States District Court for the Northern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX D.

Judgment and Decree of the United States District Court For the Northern District of Ohio, Western Division.

(Entered February 24, 1969.)

This cause came on to be heard, by stipulation of the parties, on the merits of plaintiff's complaint for injunction, the answer of defendant, the oral motion to dismiss of defendant made at the hearing, and having been tried before the Court, argued and briefed by counsel and considered by the Court, and the Court having announced its opinion which included its findings of fact and conclusions of law, it is therefore ordered, adjudged and decreed as follows:

1. That defendant's oral motion to dismiss on the ground this Court lacks jurisdiction because a "minor" dispute is involved, is hereby overruled;

2. That defendant, The Detroit and Toledo Shore Line Railroad Company, its officers, agents, servants, employees and those persons in active concert or participation with it be and they hereby are ordered, required and enjoined to employ firemen on all of defendant's locomotives operating within the State of Ohio and to cease and desist from the operation of defendant's trains within the State of Ohio without the use of a fireman as a member of an engine crew, until such time as defendant has exhausted the mandatory provisions specified in Section 6 of the Railway Labor Act for changing agreements affecting rates of pay, rules, or working conditions, unless the 1943 Eastern Diesel Agreement is changed by earlier agreement of plaintiff and defendant.

3. That defendant pay the costs of these proceedings to be taxed by the Clerk of this Court.

DON J. YOUNG,
United States District Judge.

Dated: Feb. 24, 1969.

FILED

MAY 6 1970

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1395.

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,

Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

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In the Supreme Court of the United States

OCTOBER TERM, 1969.

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BRIEF OF RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE.

Petitioner, The Detroit and Toledo Shore Line Railroad Company (hereafter Shore Line), operates over its line of railroad between Lang Yard in Toledo, Ohio, and Detroit, Michigan, and over the lines of other railroads to other points in the State of Michigan. Approximately 3.5 miles of its tracks are in Ohio and 46 miles in Michigan. Respondent Brotherhood of Locomotive Firemen and Enginemen (hereafter BLFE) represented for purposes of collective bargaining under and pursuant to the Railway Labor Act[1] the crafts or classes of enginemen and firemen employed by Shore Line.[2]

---

[1] 45 Stat. 577, as amended, 45 U.S.C. § 151, et seq.

[2] Effective January 1, 1969, the United Transportation Union became the successor organization to the BLFE, Brotherhood of Railroad Trainmen, Switchmen's Union of North America, and the Order of Railway Conductors and Brakemen.

In 1937 most United States carriers signed a National Diesel Agreement with the BLFE providing for the employment of firemen on practically all diesel powered locomotives.

On August 13, 1943, Shore Line and many other carriers entered into another National Diesel Agreement with the BLFE providing that "A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives; * * *." Similar terms endured in the subsequent 1950 National Diesel Agreement to which the Shore Line is not party.

Although the 1943 National Diesel Agreement required the employment of firemen, it did not concern itself with rates of pay, rules and working conditions of firemen employed by each carrier. On January 1, 1945, Shore Line and the local General Chairman of the BLFE entered into a 43-page local agreement detailing the rates of pay and working conditions of firemen. In 1953 they entered into another lengthy local agreement concerning rates of pay, rules and working conditions of firemen which agreement superseded the local agreement of January 1, 1945.

In 1956, the nation's carriers gave hint that they wanted discretion to determine the employment of firemen. By notice dated November 2, 1959, the Shore Line informed the BLFE pursuant to Section 6 of the Railway Labor Act[3] that effective January 1, 1960, Shore Line intended to "eliminate all agreements * * * which require the employment or use of firemen on other than steam power;" and to establish a rule that Shore Line "shall have the unrestricted right under all circumstances to determine when and if a fireman shall be used." All

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[3] 45 U.S.C. § 156.

other carriers served similar notices on the BLFE. (Notices concerning other matters were served on other Brotherhoods.) Meanwhile the lengthy procedures mandated by the Railway Labor Act continued. On March 4, 1963, this Court ruled that the parties had exhausted all the tools of the Act and the parties were free to resort to self-help, subject only to creation of an Emergency Board under Section 10 of the Act.[4] A Board was convened, made an investigation and filed its report.

On August 23, 1963, the Shore Line notified the firemen on its property that effective August 29, 1963, it intended to effect a rule that it:

> "* * * has the unrestricted right, under all circumstances, to determine when and if a fireman (helper) shall be used on other than steam power in all classes of freight * * * and * * * yard service * * *."

It further notified its firemen that all agreements would be cancelled that conflict with the proposed rule. Similar notices were served by the other carriers.

On August 28, 1963, one day before the work rules were to become effective, Public Law 88-108, 77 Stat. 132, was passed forbidding unilateral self-help by the parties and creating a Board of Arbitration, since referred to as Board 282. The Board was ordered to pass on two major issues: the use of firemen, and the size and composition of train crews. The Award, since referred to as Award 282, was to be binding on the parties and to continue in force for a period not to exceed two years. The termination date as to the BLFE was March 30, 1966. Award 282 provided a procedure whereby carriers could "blank" or abolish firemen positions at three-month intervals.

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[4] *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co.*, 372 U.S. 284, 290-291 (1963).

In 1964 the Shore Line, acting pursuant to Award 282, abolished all firemen assignments on through and local freight trains and yard engines. It also discharged, pursuant to the award, a fireman it had hired in 1963 who had a yard assignment in Michigan.[5] However, because of the Ohio full crew law Shore Line assigned a fireman, sometimes referred to as a "shuttle-fireman," to each of its southward trains at Mile Post (MP) 3.8 for operation into Lang Yard in Toledo. MP 3.8 is near the Michigan line and 3.8 miles north of the southern point of the Shore Line property. For all northward trains operating out of Lang Yard, a fireman was assigned to each locomotive and left the crew at MP 3.8.

On March 30, 1966, Award 282 expired. However, various questions arose, one of which was what work rules were in force the day after Award 282 expired. Suits and countersuits were filed, appeals and cross-appeals taken and decided in one opinion by the United States Court of Appeals for the District of Columbia Circuit.[6] Certiorari was denied by this Court on January 30, 1968, 390 U.S. 923. The Shore Line and the BLFE were parties to that litigation and decision.

It had been the position of the carriers including the Shore Line that when Award 282 expired, the blanking procedures continued in effect and constituted a continuing mechanism for reducing the employment of firemen.[7] This contention was rejected by the Court of Appeals:

> "* * * Upon the expiration of the two-year period the special machinery was exhausted and in the absence of agreement only the system of the Railway Labor

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[5] Michigan does not have a full crew law.

[6] *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt Railroad Company*, 385 F.2d 581 (1967), hereafter sometimes referred to as the *Akron* case.

[7] *Id.* at 608.

Act was available for future changes in substantive work rules * * *." [8]

The Court of Appeals pointed out that the National Diesel Agreement requires that a fireman be employed on all locomotives, and said:

"* * * Award 282 continued this requirement (and any others stemming from agreement or practice), until changed in accordance with the Award * * *. But when the Award expired, so did the procedures it suggested. What survives is the complex of work rules in force on the last day prescribing the substantive terms that controlled the use of firemen on individual runs.[9]

"The National Diesel Agreement was not set aside by the Board * * *." [10]

The Court also stated as follows:

"In consequence, a carrier is not only prevented from taking 'affirmative acts' under the Award to reduce the use of firemen, as the District Court properly held, but also, if the carrier was required to keep a fireman on a particular crew as of the last day of the Award, it cannot thereafter change the work rule by discontinuing that position, except by agreement or in accordance with Section 6. The work rule that continues in force provides for a fireman on this crew, and that is not changed because the particular fireman on duty dies or retires." [11]

The Court of Appeals further stated:

"* * * The predicate of our ruling is, simply, the force of the Railway Labor Act. Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Rail-

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[8] *Id.* at 608.
[9] *Id.* at 610.
[10] *Id.* at 611.
[11] *Id.* at 611.

> way Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change * * *." [12]

Despite these holdings to which it was party that the blanking procedures under Award 282 expired on March 30, 1966; that the National Diesel Agreement was not set aside; and that any changes must be by agreement or pursuant to Section 6 of the Act; the Shore Line on February 8, 1968, and eight days after this Court denied certiorari, unilaterally and without notice abolished the shuttle-firemen positions.

Claiming that Shore Line violated the provisions of Section 2 Seventh of the Railway Labor Act,[13] the BLFE, on February 14, 1968, filed its complaint for injunction (A. 3-7)[14] seeking to require Shore Line to employ firemen on its locomotives in Ohio until such time as Shore Line resorts to and exhausts the mandatory procedures specified by the Railway Labor Act. On March 4, 1968, Shore Line filed its answer. On that date, and despite the decision of the Court of Appeals in the *Akron* case, the Shore Line insisted that the blanking procedure for abolishing firemen pursuant to Award 282 was still in effect (A. 24, 133).

---

[12] *Id.* at 593.

[13] 45 U.S.C. § 152 Seventh: "No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act."

[14] Appendix in the court below.

Shore Line also defended its action of abolishing the shuttle-firemen positions by claiming that the Ohio full crew law was no longer applicable because of its reconstruction of its tracks (A. 10). However, this defense also constituted a repudiation of the *Akron* decision to which it was party, for the Court of Appeals had said:

> "* * * The repeal of a full crew law subsequent to the expiration of Award 282 came after expiration of the Board's authority under the temporary statute and after expiration of the power of a carrier to invoke the procedures of the Award.
>
> "The carriers argue in effect that the Award at least authorized the carriers to blank firemen positions during the lifetime of the Award, with this personnel action remaining in a state of suspended animation until its vitalization upon repeal of the full crew law. * * * But this conditional blanking was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award. * * *" [15]

Attempted removal by the Shore Line of the bar of the Ohio full crew law did not materialize during the 2-year lifetime of Award 282.

And on April 3-4, 1968, at the hearing on the motion for preliminary injunction, the Shore Line for the first time in the history of its dealings with the BLFE claimed that the 1943 National Diesel Agreement was terminated in 1953 when no reference was made to it in the 1953 local agreement setting forth rates of pay, rules and working conditions. If this claim had any basis, Shore Line could have abolished all firemen assignments in Michigan in 1953. But the facts are that it employed firemen since 1953 in Michigan which did not have a full crew law; it served a Section 6 notice on the BLFE in 1959 stating that

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[15] 385 F.2d at 611-612.

it intended to eliminate its agreement which requires the employment of firemen; it joined the national movement with other carriers which eventually led to Award 282; and in 1964, pursuant to that Award, it wasted no time in abolishing firemen positions in Michigan.

ARGUMENT.

This case illustrates the Shore Line's continued attempt to avoid its obligations under the Railway Labor Act and to ignore the rights of the BLFE.[16] In *Shore Line R.R. Co. v. United Transportation Union*, ____ U.S. ____, 24 L. Ed. 2d 325 (December 9, 1969) it unilaterally sought to change working conditions without following the procedures of the Act. This Court held, however, that the status quo provisions of the Act extend to actual working conditions out of which a dispute arose and those conditions need not be covered in an existing agreement. And it simply refuses to acknowledge the decision of the *Akron* case.

In this case Shore Line has sought to avoid the procedures of the Act for changing agreements by its contrived argument that the 1943 National Diesel Agreement was terminated in 1953 and its further claim that a resolution of that argument is one to be decided by the National Railroad Adjustment Board. As we have pointed out this claim is made in bad faith, is completely inconsistent with Shore Line's employment of firemen since 1953, and its joining of the national movement to terminate the diesel agreement culminating in Award 282. The question presented by Shore Line in its petition filed herein discloses that it is not important, but solely concerns its quarrel with the decisions of the courts below.

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[16] See *Detroit and Toledo Shore Line R. Co. v. BLFE*, 357 F.2d 152 (6th Cir. 1966).

Shore Line cites *Pitney*[17] for its argument that the "decisions below are flatly contrary to applicable decisions of this Court."[18] *Pitney* held that the proper forum for interpreting agreements is the National Railroad Adjustment Board. Nothing in the decisions below reveal the remotest conflict with *Pitney*.

The action below by the BLFE was one to require Shore Line to comply with the positive mandates of the Railway Labor Act for changing agreements and working conditions. In its attempt to avoid its obligations under the Act and to rid itself of the jurisdiction of the district court, it claimed a "minor" dispute was involved. The courts below correctly rejected this argument.

CONCLUSION.

For the foregoing reasons it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[17] *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946).

[18] Petition for Writ of Certiorari, at 6.

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REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

In our Petition we showed that a consideration of the defenses to the union's Complaint in the case at bar necessarily involved the interpretation or application of the collective bargaining agreements received in evidence and that such issues were therefore properly within the primary, exclusive jurisdiction of the National Railroad Adjustment Board under Section 3 First (i) of the Railway Labor Act, as a consequence of which the courts below erroneously assumed jurisdiction.

The Brief of Respondent in opposition ignores the question presented in the Petition and the jurisdictional issue in the case at bar, the Brief being limited to an argumentative statement of the merits of the contract dispute.

Respondent does not cite any authority on the jurisdictional issue, but merely argues in favor of its interpreta-

tion of the collective bargaining agreements, saying that the 1943 national diesel agreement survived the 1953 local schedule agreement as a basis for the injunction entered against the Shore Line in the District Court.

A clearly defined contract dispute admittedly existed in the case at bar over whether the firemen's work rule on the Shore Line was carried forward in 1953 from prior local and national agreements. In order to resolve the dispute on the merits it was necessary for the courts below to interpret the 1953 agreements. Thus, in the next to last paragraph of its opinion, the Court of Appeals said that "We have read the contract provision relied upon by Appellant and find ourselves in general accord with the District Judge's interpretation set forth above * * *" (Appendix A to the Petition at page 13).

Respondent's discussion of Arbitration Award 282 on pages 4 through 7 of its Brief merely confuses the question presented. This issue was a necessary element of the union's cause of action and was briefed in the courts below, but was not raised by Petitioner in the Petition herein. The sole issue before this Court is whether the District Court erroneously assumed jurisdiction of a contract dispute over the interpretation or application of a collective bargaining agreement.

Respondent argues further on the merits at pages 5 and 6 of its Brief that the Shore Line's contract defense in the case at bar is not well taken for the reason that the Court of Appeals in *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt Railroad Company*, 385 Fed. 2d 581 (1967), held that the national diesel agreement was not set aside by Arbitration Board 282. As noted above, the question presented in the Petition in the case at bar is limited to the jurisdictional issue, but in order to avoid confusion on the merits, we respectfully point out that the allegations and defenses raised in the case at bar were

not before the Court of Appeals in the *Akron* case and that Court was referring to the 1950 national diesel agreement, to which the Shore Line was not a party, rather than to the 1943 agreement relied upon by Respondent in the case at bar. Further, the fact that the Shore Line was not a party to the 1950 national diesel agreement was consistent with the omission of the firemen's work rule from the 1953 local schedule agreement.

At page 7 of its Brief, Respondent argues that the Shore Line asserted its defense on the merits for the first time in the District Court. This statement is irrelevant to the jurisdictional issue and it is also unsupported by the evidence; but in any event the Shore Line was the Defendant in the District Court and it was therefore obviously unnecessary for it to assert any defense until such time as a suit had been brought against it.

Respondent's reference to litigation between the parties in this Court last year is also irrelevant inasmuch as that case did not involve the jurisdictional issue raised herein. If the Shore Line has been guilty of bad faith as Respondent contends, then facts in support of this statement should be brought to the attention of the Adjustment Board having jurisdiction of the contract dispute between the parties.

For the reasons stated herein and in our Petition, a writ of certiorari should be granted.

Respectfully submitted,

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